LIBRARY

Office-Supreme Court, U.S.
FILED
APR 17 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 961.

CALVIN KOVENS and LEON COHEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF.

W. G. WARD
1240 duPont Building
Miami 32, Florida
Attorney for Petitioner Kovens

IRWIN J. BLOCK
11th Floor Dade Federal Building
Miami 32, Florida
Attorney for Petitioner Cohen

CHESTER BEDELL
1520 Barnett National Bank Building
Jacksonville, Florida 32202
Attorney for Petitioners

TABLE OF AUTHORITIES

CASES.

	PAGE
Morissette v. *United States* (1952), 342 U. S. 246.....	2, 5
Rhodes v. *United States* (4th Cir. 1960), 282 F. 2d 59	2
Smith v. *United States* (6th Cir. 1955), 230 F. 2d 935	2
United States v. *Niro* (2d Cir. 1964), 338 F. 2d 439....	2

STATUTE.

Title 18 United States Code,
Section 1014 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 961.

CALVIN KOVENS and LEON COHEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF.

The trial court's ruling that "the testimony should be restricted to the truth or falsity of the statement and items accompanying it" (opinion of court of appeals, A. 32) and the ruling of the court of appeals that

> "Proof which would be relevant on the issue of general fraud is not necessarily relevant on a determination of whether the statements here involved were in fact true or false. With this construction of the alleged offense in mind, we conclude that the trial court did not err in rejecting the testimony tendered by the appellants."
>
> Opinion, A. 32-33,

raise these fundamental questions:

1. Is proof of criminal intent essential to a conviction of the offense proscribed by Title 18 U. S. C. §1014, one of the "Fraud and False Statements" statutes in Chapter 47, United States Code?

2. If so, what kind of evidence may a citizen charged with that crime adduce at his trial to show that he had no criminal intent?

In its brief in opposition the Government does not deny that criminal intent is an essential element of the offense. That could not reasonably be denied. *Morissette* v. *United States* (1952), 342 U. S. 246; see also *Smith* v. *United States* (6th Cir. 1956), 230 F. 2d 935; *Rhodes* v *United States* (4th Cir. 1960), 282 F. 2d 59; and *United States* v. *Niro* (2d Cir. 1964), 338 F. 2d 439. It therefore seems to us a special and important reason for granting the writ that, while the Government does not contest that criminal intent is an essential element of the offense, petitioners stand convicted under a "construction of the alleged offense" (opinion of the court of appeals, A. 33) that limits the jury's inquiry to "the truth or falsity of the statement and the items accompanying it" (opinion, A. 32).

The Government's argument in opposition to granting the writ is not that the issue of criminal intent was irrelevant to the case but that the evidence offered by petitioners was irrelevant to that issue. That argument would seem to conflict with, and not to justify, the lower court's explicit holding that the proffered evidence was

> "not necessarily relevant on a determination of whether the statements here involved were in fact true or false."
>
> Opinion, A. 33.

Moreover, that argument forcefully demonstrates how a citizen may be accused of having acted with criminal intent, be assured by the court and prosecutor that he cannot be convicted unless he acted with criminal intent, and yet be utterly frustrated in his attempt to show the jury, by cogent evidence, that he did not.

In a baseless but apparently irresistible argument that has recurred in this case like a nightmare, the Government again asserts, in its brief in opposition, that petitioners "falsely 'padded' " the construction draws submitted to the Association (brief in opposition, p. 10); that petitioners "misled the Association" by "misleading releases of lien" (brief in opposition, pp. 10, 11); that petitioners "were overstating the cost of certain construction and using the

excess to repay the initial loan to Ruedd" (brief in opposition, p. 10); and that the petitioners sought payment from the Association "for nonexistent construction or padded construction costs" (brief in opposition, p. 11) in order to obtain "100 percent financing of the construction costs of the shopping center from borrowed funds" (brief in opposition, p. 8).* The Government argued in like vein to the jury (R. 733-37, 764-72) and, with equally telling effect, to the court of appeals.

These recurring arguments are all the more difficult to overcome because they are based not on evidence but on suppositions that are plausible only because the substantial evidence to the contrary, offered by petitioners to show the truth about their intentions in dealing with the Association, was largely excluded by the trial judge as being foreign to "a determination of whether the statements here involved were in fact true or false" (opinion of court of appeals, A. 33). We shall not again set forth at length the excluded evidence (see petition, pp. 7-9) but only say, in summary, that it tended to show that, any legalistic interpretation of the loan agreement to the contrary notwithstanding, the Association and the contractor knew and intended that the loan funds would be disbursed on the basis of the value of the work incorporated in the job [as permitted by the A. I. A. form of contract between the owner and contractor (R. 922) specifically referred to in the construction loan agreement between the Association, the owner and the contractor (R. 876)] and not mechanically

* The Government does not deny that the shopping center was successfully completed, that every bill was paid, and that every subcontractor who had a lien released or waived it and never asserted it. The Government suggests, as illustrative of the way in which petitioners purportedly misled the Association, that petitioners submitted a partial release of lien executed by Marx Brothers to release its lien in consideration of the sum of $24,940. Yet, it is not suggested that Marx Brothers thereafter had or asserted a lien, or that $24,940 was not actually expended for fill. In fact, the fill work was done by the Kovens Corporation itself, which, of course, was entitled to be reimbursed for that cost, and the Marx Brothers' release was submitted through error (R. 592, 593, 880).

on a showing of paid bills aggregating the amount to be drawn; and that, in any event, the contractor had invariably expended in the job, at the time each draw was submitted, an amount exceeding the amount sought to be drawn.

Throughout the trial and on appeal, when petitioners sought to refute such extravagant claims as that "petitioners were overstating the cost of certain construction" (brief in opposition, p. 10), the Government invariably dismissed petitioners' response as irrelevant. For example, the following occurred at the trial when the prosecutor put that particular accusation in his cross-examination of petitioner Kovens:

> "By Mr. Paisley [the prosecutor]:
>
> "Q. You prepared this case with your lawyers. What is the total amount of the alleged overstatement as to Draw No. 1?
>
> . . .
>
> "A. So far as I am concerned, sir, the work was all in the project and most probably well ahead of any requisitions put in from our company as our records and history would show, sir.
>
> "Mr. Paisley:
>
> "Your Honor, I ask the Court to instruct the witness to answer the question.
>
> "The Court:
>
> "Answer the question, Mr. Kovens. That is not a responsive answer.
>
> "A. I deny it, sir."
>
> R. 677, 678.

The court of appeals held that, in making such rulings, the trial judge properly

> "determined that evidence attempting to show that in fact the total amount covered by the escrow arrangement had ultimately gone into the construction project and or that, at the time the Draws were submitted, an amount equalling the total amount of the Draw had actually been expended on the project would not be received in evidence. . . ."
>
> Opinion, A. 32.

In holding that the matter for determination by the jury was "the truth or falsity of the statement and the items accompanying it" (A. 32), the courts below assumed, *sub silentio*, that petitioners indeed made and intended to make the statement attributed to the draw papers by the Government. This assumption was indulged in spite of the fact that petitioners insisted and offered to prove that no one who dealt with the prolix and ambiguous draw and lien release forms—not the materialmen, nor the contractors, nor even the Association (see petition, p. 8)—attributed to them the meaning insisted on by the Government.

In *Morissette*, the trial judge committed fundamental error in holding it irrelevant that the bomb casings had the look of abandoned property and that the accused thought them abandoned and so took them away. Presumptive intent, this Court said (342 U. S. at 275), had no place in that case. Here, the error was less obvious and hence more insidious. All the while assuring the defendants and the jury that criminal intent is an essential element of the offense and that the jury might

> "consider . . . all facts and circumstances in evidence which may aid determination of state of mind, remembering that his [each defendant's] intent and knowledge must be proved beyond and to the exclusion of a reasonable doubt."
>
> Charge to the jury, R. 786, quoted in brief in opposition, p. 14,

the trial judge consistently excluded evidence of the "facts and circumstances" which might have aided the jury in that determination. Thus, buttressed by the prosecutors' ringing appeal for a verdict that would protect the Association's depositors (R. 737), the court's charge, permitting the jury to infer criminal intent from petitioners' conduct "unless the contrary appears from the evidence" (R. 786), had its inevitable effect.

The petition should be granted.

Respectfully submitted,

W. G. Ward
1240 duPont Building
Miami 32, Florida
Attorney for Petitioner Kovens

Irwin J. Block
11th Floor Dade Federal Building
Miami 32, Florida
Attorney for Petitioner Cohen

Chester Bedell
1520 Barnett National Bank Building
Jacksonville, Florida 32202
Attorney for Petitioners